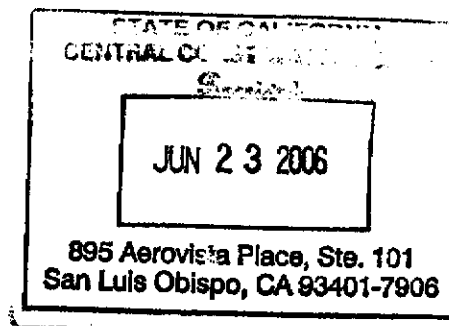


06/23/06

Michael Thomas  
Assistant Executive Officer  
Central Coast Water Board  
895 Aerovista Place, Suite 101  
San Luis Obispo, CA 93401



RE: Proposed Cease and Desist Orders Against Individual Properties in the Los Osos /  
Baywood Park Prohibition Zone – Presentation of Prosecution's Case

Dear Mr. Thomas:

On May 18, 2006, the Central Coast Regional Water Quality Control Board ("RWQCB") issued a request for written arguments regarding a number of procedural items stemming from the replacement of Lori Okum on the Prosecution Team with new counsel. This letter represents my official comments on those matters.

1. The prosecution case must be stricken from the beginning. Of course the bell can not be "unrung" and the entire case should be thrown out as Ms Okum's involvement and influence over the prosecution pervades the entire process to date.
2. The only way the prosecution staff should be allowed to present any additional information to the Water Board is if the current cases are dismissed and a new prosecution and different prosecution is started.
3. If the prosecution case is allowed to submit additional written materials then of course the designated parties should be allowed to submit additional written materials.
4. If the prosecution staff is allowed to present a new case then the Los Osos Community Service District should be allowed to present a new case.

Again, I believe the whole process has been corrupted by Ms Okum's involvement in the decision to issue individual CDOs. The proposed CDOs against individual property owner should be thrown out and a prosecution team with new counsel should decide on the proper course of action.

Sincerely,

# Central Coast Regional Water Quality Control Board

## Administrative Services

SSM/L  
Cynthia Jones  
4800-001

SSA  
Sandy Denny  
5157-702

5157-705  
Sandy Check  
5157-002

OT  
Kathy Blackshear  
1139-005

QA  
Sue Gaudin  
1379-002  
Barbara Brooks  
1379-003

Student Assistants  
Nancy Xiang  
Richard Nichols

Enforcement  
WRCE  
Todd Stanley  
3848-034  
Matt Thompson  
3848-033

Supervising WRCE  
Enforcement  
Harvey Packard  
3849-002

Assistant  
Executive Officer  
CEA II  
Michael Thomas  
7500-002

Executive Officer  
Roger W. Skaggs  
3843-002

EA  
Carm Hewitt  
1728-004

## Board Members

Jeffrey S. Young - Chair  
Russell M. Jeffries - Vice Chair  
Leslie S. Bowler  
Gary C. Shalcross Daniel M. Press  
Monica Hunter John Hayzlett

## Monitoring and Assessment

SW/ES  
Karen Worceler  
0765-005

## Stormwater

Senior WRCE  
Chris Adair  
3844-008

WRCE  
Ryan Lodge  
3846-055  
David Inaba  
0762-023

EG  
Donette Dunaway  
3759-001  
Dominic Roque  
3759-015

ES  
Brandon Sanderson  
0762-057

Students  
Daniel Gulleraz  
Scott McAllister  
Kevin Ortel

## Watershed Management

Senior ES  
Lisa Horowitz  
McCam  
0764-002

EG  
Lou Black  
3766-003  
Pete Dornowsky  
3759-006

WRCE  
Shirley Keeling  
3846-026

ES  
Larry Harlan  
0762-008  
Mary Adams  
0762-010  
Chris Rose  
0762-013  
Ken Sanders  
0762-026

## NPSA/Grants

Senior EG  
John Robertson  
3751-105

ES  
Amanda Bern  
0762-011  
Alicia Jones  
0762-005  
Jill Wilson  
0762-020  
Peter Meesters  
0762-027  
Elaine Said  
0762

SEA  
Carlene Hudobly  
3826-017

WRCE  
Howard Kobb  
3846-013

Students  
Bethany Crene

## NPS/MDU Grants

Senior WRCE  
Vacant

WRCE  
Angela Carpenter  
3846-036

ES  
Bill Hoffman  
0762-016  
Katie McNeil  
0762-007  
Julia Dyer  
0762-001  
Elaine Said  
0762

## DOB-Permitting

Senior WRCE  
Eric Gohler  
3844-102

EG  
Linda Stone  
3759-007  
Grant Himebaugh  
3759-005  
David Schwartzblatt  
3759-010

WRCE  
Kathleen Seley  
3846-053  
Heider Hernandez  
3846-056  
Carol Kobb  
3826-005

Students  
Nathan Schreiner

## Northern Permitting and Title

Senior WRCE  
vacant

WRCE  
Tom Kugel  
3846-015  
Mike Higgins  
3848-003  
Martin Fletcher  
3848-020  
Cecilia DeMarini  
3848-022

EG  
Dan Niles  
3759-012  
Dean Thomas  
3759-

## Southern Permitting

Senior EG  
vacant

SEA  
Sorel Marks  
3826-006

ES  
Peter van Lengen  
0762-012  
Allison Mithollen  
0762-025  
Dave LaCero  
0762-024

WRCE  
Matt Keeling  
3846-023

## UGT

Senior EG  
Burton Chabwick  
3751-107

WRCE  
John Milares  
3846-011  
John Gant  
3846-002

EG  
Thomas Sales  
3759-014  
Corey Walsh  
3759-004  
Wei Lu  
3759-011

Student  
Kevin Crossley

## SLIC

Senior EG  
Shelia Seidenberg  
3751-106

WRCE  
Karyn Steckling  
3846-054  
Frank DeMarco  
3846-009

EG  
Diane Kukul  
3759-006  
Thea Tryon  
3759-017  
Rich Chandler  
3759-019

Student  
Bernie Chin

## LAW OFFICES

**BURKE, WILLIAMS & SORESENSEN, LLP**444 SOUTH FLOWER STREET, SUITE 2400  
LOS ANGELES, CALIFORNIA 90071-2953

Tel: (213) 236-0600

Fax: (213) 236-2700

www.bwlaw.com

INLAND EMPIRE OFFICE  
3403 TENTH STREET, SUITE 500  
RIVERSIDE, CALIFORNIA 92501-3659  
Tel: (951) 788-0100  
Fax: (951) 788-5785ORANGE COUNTY OFFICE  
5 PARK MELOA, SUITE 1280  
IRVINE, CALIFORNIA 92614-2547  
Tel: (949) 861-3363  
Fax: (949) 861-3130SAN DIEGO OFFICE  
701 "B" STREET, SUITE 1700  
SAN DIEGO, CALIFORNIA 92101-8142  
Tel: (619) 615-4672  
Fax: (619) 615-6673SAN JOSE OFFICE  
96 NORTH THIRD STREET, SUITE 620  
SAN JOSE, CALIFORNIA 95112-3573  
Tel: (408) 299-0422  
Fax: (408) 299-0429VENTURA COUNTY OFFICE  
2310 EAST PONDE ROSA DRIVE, SUITE 22  
CAMARILLO, CALIFORNIA 93010-4747  
Tel: (805) 987-3468  
Fax: (805) 472-8834

## FACSIMILE MESSAGE

TO: Michael Thomas, Assistant Executive Director      DATE: June 22, 2006

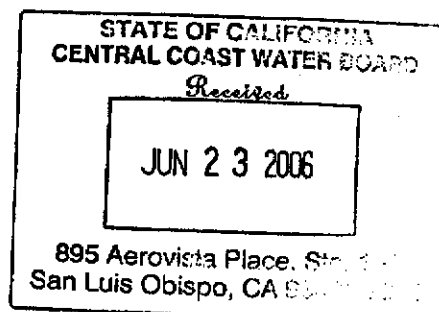
FAX NO: (805) 543-0397      FILE #: 04844-0008

FROM: Stephen R. Onstot

SUBJECT: Proposed CDO's/Los Osos and Baywood Park Residents

TOTAL NUMBER OF PAGES (INCLUDING THIS PAGE): 19

NOTE: Please see attached.



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1           And in the face of State and Federal  
2 water quality protection laws that are bearing  
3 down on the District, nothing really happened. I  
4 didn't anything that made me feel comfortable that  
5 this was really kind of an informed decision,  
6 other than a predetermined decision that has been  
7 clear throughout that the intent, unequivocally,  
8 was to stop the site at its current location --  
9 stop the project at its current location, period.  
10 That's essentially what has happened.

11           I agree that the individual enforcement  
12 actions I think are critical. I think that they  
13 have to start as soon as staff can start to  
14 process things and get them moving.

15           It's quite clear to me that the folks of  
16 Los Osos, in my opinion, are really not capable of  
17 addressing these issues with their wastewater  
18 disposal in a rational way. I don't know what's  
19 going to happen. A bunch of lawsuits have been  
20 settled, then replaced by an equal number of  
21 lawsuits. We're just exchanging lawsuits.

22           And I don't really see any clear end to  
23 this dilemma at this point because the community  
24 is really so polarized. And it really is just a,  
25 it's a tragedy.

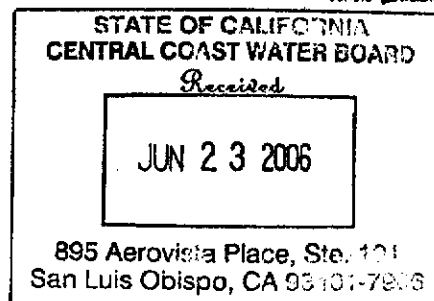
414 South Flower Street Suite 2400  
Los Angeles, California 90071-2954  
voice 213.236.0600 - fax 213 236.2700  
www.bwslaw.com

BURKE, WILLIAMS &amp; SORENSEN, LLP

William's Direct Dial:  
(213) 236-2830  
Our File No:  
4844-006  
sorsen@bwslaw.com

June 22, 2006

**Via facsimile (805) 543-0397 and electronic mail**  
Michael Thomas, Assistant Executive Director  
Central Coast Water Board  
895 Aerovista Place Suite 101  
San Luis Obispo, CA 93401



Re: **Proposed CDO's/Los Osos and Baywood Park Residents**

Dear Mr. Thomas:

The undersigned represents the Los Osos Community Services District ("District"), a Designated Party in the above-referenced matter. This letter is submitted pursuant to Michael Thomas' May 18, 2006 letter memorializing the briefing schedule on due process issues ordered by Chairman Young during the status conference on May 11, 2006.

Mr. Thomas' letter requests responses to five (5) questions, all of which will be answered in detail below. However, for clarity, the "short answers" are:

1. Yes, the Prosecution's case must be stricken entirely.
2. Yes, if the Prosecution starts over, so does the production of evidence.
3. Yes, if the Prosecution presents a "supplemental case," the Designated Parties should have the opportunity to supplement their cases as well.
4. Yes, common sense dictates that if the Prosecution begins anew then the defense begins anew as well.
5. The District has no personal issues that require accommodation at this time.

In addition, and as will also be further explained below, the District contends that all of the CDO prosecutions must be dismissed and, if necessary, commenced again and that those matters can neither be prosecuted by a team that includes senior RWQCB staff nor adjudicated by RWQCB members Young, Shallcross, Press, or Hayashi.

LA #4850-2781-0561 v1

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1 amount of time.

2 CHAIRPERSON YOUNG: Mr. Hayashi.

3 BOARD MEMBER HAYASHI: Yeah, I'd like to  
4 echo the same feelings from my fellow Board  
5 Members. Especially, you know, something that's  
6 so important as water quality and how it affects  
7 each and every one of you and your community.

8 I mean when you have something that  
9 that's important and you have less than 29 percent  
10 of the people come out and vote, then you've  
11 changed the whole direction by 15 votes. I mean,  
12 where were the people that -- where was everybody  
13 to vote?

14 (Audience participation.)

15 BOARD MEMBER HAYASHI: So, -- 69 percent  
16 came out? Oh, I got -- okay. But, anyway, it's a  
17 sad time. And I don't know what to say. I mean  
18 one day things will happen, one day things will  
19 change. And we just have to hope for the best.

20 So, that's all I have to say.

21 CHAIRPERSON YOUNG: All right. You  
22 know, I know that there are people that are just  
23 not going to understand nor agree with what the  
24 Board has said or what the Board has done.

25 People will look at a situation and come

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### **STATEMENT OF RELEVANT FACTS**

In late 2005 and into 2006, the RWQCB brought an Administrative Civil Liability ("ACL") action against the District for alleged violations of a Time Schedule Order and basin plan prohibitions. Such ACL action was adjudicated by RWQCB members Young, Jeffries, Shallcross, Press, and Hayashi who, on January 5, 2006 found against the District and imposed fines in excess of \$6.5 million. However, in so ruling, the Board explicitly stated that the ACL action "did not go far enough" and directed RWQCB Executive Officer Roger Briggs to pursue enforcement actions against the 4500+ individual homeowners who relied on septic systems to manage their waste.

**CHAIRPERSON YOUNG:** In now, because some Board Members have expressed some concern about whether this [ACL] penalty is enough.

**BOARD MEMBER PRESS:** I'm interested in water quality, and that is why we are instructing staff and urging staff to come back with individual enforcement actions.

**BOARD MEMBER SHALLCROSS:** I concur with Dr. Press. ...We don't seem to be getting anywhere, and so hopefully going after the individual dischargers may create the political will for something to happen in a reasonable amount of time.

**BOARD MEMBER HAYASHI:** Yeah, I'd like to echo the same feelings from my fellow Board Members.

**CHAIRPERSON YOUNG:** I agree that the individual enforcement actions I think are critical. I think they have to start as soon as staff can start to process things and get them moving. It's quite clear to me that the folks of Los Osos, in my opinion, are really not capable of addressing these issues with their wastewater disposal in a rational way.

(Transcripts of January 5, 2006 RWQCB meeting on ACL action, attached hereto)

Mr. Briggs began such prosecutions immediately, announcing on January 18, 2006 that Cease and Desist Orders ("CDO's") were being prepared against individual homeowners and that a Prosecution Team had been formed to pursue these actions. The Prosecution Team consisted of the following RWQCB staff: Roger Briggs, Executive Officer; Harvey Packard, Supervisor of Enforcement; Sorrell Marks, Senior Staff; Matt Thompson, Enforcement Engineer; and Lori Okun, the RWQCB's legal counsel. According to the attached organizational chart, this means that 4 out of the 6

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1 community like this sort of going at each other's  
2 throats in a really ugly way. It hasn't been fun  
3 to watch.

4 At first maybe it was sort of  
5 entertaining, but, you know, the more I learned  
6 about it, the more I read about it, the more I saw  
7 what was going on with the community, it sort of  
8 makes me sick to my stomach really. I really feel  
9 sorry for the folks who are there and have to go  
10 through it, no matter which side you're on. It's  
11 really very sad.

12 Hopefully at some point you guys can all  
13 get together and hold hands and sing kumbaya.  
14 But, it doesn't look like it's going to happen  
15 anytime soon.

16 Again, just to reiterate the other  
17 sentiments, it looks like our enforcement  
18 abilities going down the path we have been have  
19 been ineffectual. For many years now we've tried  
20 to work with the CSD. We tried to work with the  
21 folks prior to the CSD.

22 We don't seem to be able to get  
23 anywhere, and so hopefully going after the  
24 individual dischargers may create the political  
25 will for something to happen in a reasonable



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Page 3

most senior staff members--the ones who most regularly advise the RWQCB members the most-- were named to the Prosecution Team.

Shortly thereafter, the proposed CDO's were issued against 50 (later reduced to 45) individual septic system owners who were chosen 'at random' by the Prosecution Team. Procedural comments were received by Chairman Young which lead to a February 28, 2006 Hearing Notice whereby briefs and evidence by all parties (including the Prosecution) were to be submitted by April 4, 2006, rebuttal briefs and evidence by all parties (including the Prosecution) submitted by April 19, 2006 and hearing before the RWQCB to be held on April 28, 2006.

At the hearing, the District moved to dismiss on due process grounds, alleging that (1) the RWQCB members who asked that the prosecutions be brought should not be the same ones adjudicating the cases, and (2) that RWQCB staff members who routinely advise the RWQCB should not serve on the Prosecution Team prosecuting cases before that same RWQCB. The District's motion was denied.

Public comments were then received, and the Prosecution put on its case-in-chief in its entirety. Next, the District put on about half of its case before the hearing was continued to May 11 due to the late hour.

On May 4, 2006, Ms. Okun withdrew as the Prosecution Team's counsel and the Prosecution Team requested that the May 11 hearing be continued so that they could procure new legal counsel. The stated reason is that the Office of Chief Counsel of the State Water Boards believes it best not to litigate "dual role" due process issues here as well as in pending court cases. Such letter also mentions the State Boards newly created Office of Enforcement, which is designed to remedy the due process shortcomings inherent in the Water Boards long standing enforcement protocol.

Chairman Young granted the request for continuance, but reserved May 11 for a status conference. On that day the RWQCB heard argument as to how to proceed given the change in the make up of the Prosecution Team. Mr. Thomas' May 18, 2006 letter setting a briefing schedule on due process issues followed.

### **ARGUMENT**

#### **Due Process is Guaranteed By The Constitution And Its Provisions Should Be Interpreted Broadly, Not Narrowly**

In her April 27, 2006 letter to District President Schicker, Tam Doduc, Chair of the State Water Resources Control Board writes:

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1 I think, tonight, is that movement. And I would  
2 like to be on the record as strongly supporting  
3 that.

4 CHAIRPERSON YOUNG: Mr. Shallcross? Mr.  
5 Hayashi?

6 BOARD MEMBER SHALLCROSS: I concur with  
7 Dr. Press. The one thing I wanted to address is  
8 something that the CSD attorneys brought up.

9 There seemed to be an implication that  
10 the -- and if you carried your argument to its,  
11 actually you didn't have to take too much of a  
12 leap to get there, that basically you were saying  
13 that the CSD can't be fined.

14 And what that does is that basically,  
15 you know, one of the attorneys was saying you  
16 can't be fined, and the other was saying give us  
17 cease and desist orders. Well, if you can't fine  
18 them, then cease and desist orders are worthless.

19 So I just wanted to say that if we can't  
20 fine someone then all of our enforcement tools are  
21 out the window, if we don't have fines to back it  
22 up. So I didn't buy that argument, obviously.

23 The other thing I just wanted to say is  
24 I think it's probably one of the saddest things  
25 that's come before the Board, just to see a

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"Thank you for your email. The State Water Resources Control Board takes due process concerns very seriously. While I cannot actively intervene in the ongoing process before the Central Coast Water Board, I have relayed your concerns to the Regional Water Board staff. I have also requested that they carefully consider all procedural requests (such as your request for continuance) and ensure that their hearing procedures protect the due process rights of all individuals."

Chair Doduc's view is certainly consistent with the 5<sup>th</sup> Amendment to the U.S. Constitution (applied to states via the 14<sup>th</sup> Amendment) which states that, in relevant part, "[n]o person shall be ...deprived of life, liberty, or property without due process of law." From a procedural perspective, this constitutional right simply means that if the government must ensure a fair decision-making process when it seeks to deprive an individual of life, liberty or property. Due process always requires a relatively level playing field, the "constitutional floor" of a "fair trial in a fair tribunal." In other words, a fair hearing before a neutral or unbiased decision-maker. *Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4<sup>th</sup> 81, 90 (citing numerous U.S. Supreme Court due process decisions).

Such constitutional protections have been interpreted broadly in favor of jealously guarding due process rights. As applied to administrative hearings, due process:

"...also demands an *appearance* of fairness and the absence of even a *probability* of outside influence on the adjudication. In fact, the broad applicability of administrative hearings to the various rights and responsibilities of citizens and businesses, and the undeniable public interest in fair hearings in the administrative adjudication arena, militate in favor of *assuring* that such hearings are fair." *Nightlife Partners, supra* (emphasis added)

Accordingly, the legal standard in the instant CDO proceedings is for this RWQCB to *assure* not only *actual* fairness but also the *appearance* of fairness and favor the protection of rights over concerns for expediency and making political statements.

**The Instant CDO Actions Must Be Dismissed And Any Others Started Anew**

Here is a snapshot of where we are in the current process: the Prosecutor Team has presented its case and the responding parties have begun to put on the defense; therefore, the relevant inquiries to be made are (1) whether this RWQCB can *assure* that the process has, to date, *appeared* and *actually was* fair, and (2) whether

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1 the City of Salinas to go.

2 So needless to say, we do have a  
3 regional facilities which is working fine. We're  
4 paying, been paying since 1981.

5 But I looked at that and thought of what  
6 the CSD and what the citizens of that location are  
7 going to go through. And I'm just wondering what  
8 in the world are you really thinking about.

9 Mr. Chairman, that's all I have to say.

10 CHAIRPERSON YOUNG: Okay. Dr. Press.

11 BOARD MEMBER PRESS: I have always been  
12 less interested in money than in water quality.  
13 In my view we could have imposed larger fines; we  
14 could have looked at a schedule of suspended fines  
15 and tried to get some of the fines if we get some  
16 progress.

17 But I'm not so interested in the money.  
18 I'm interested in water quality, and that is why  
19 we are instructing staff and urging staff to come  
20 back with individual enforcement actions. Because  
21 that's the only way that I can see at this moment  
22 that there will be a water quality improvement in  
23 anything like, remotely like a reasonable period  
24 of time.

25 So, to me that's the even bigger story,

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Page 5

this RWQCB can **assure** that the process going forward will **appear** and **actually** be fair. Each of these is addressed, in turn, below.

***The Process To Date Has Been Inherently Unfair***

As noted above, the decision to initiate prosecution of the individual septic system owners was made by this RWQCB on January 5 when it directed Mr. Briggs to begin such process. That is tantamount to a superior court judge telling a District Attorney which citizens to make defendants and which defendants to take to trial before that very same judge. It appears unfair and is **actually** unfair because the adjudicative arm of the government must be kept separate from the prosecution arm in order for fairness of process to occur. *Withrow v. Larkin* (1975) 421 U.S. 35, 47. In this case, four RWQCB members crossed the line by straying from their role as adjudicators and openly directing which individuals were to be prosecuted before them.

In addition, the secret "random" method by which the first "lucky 50" were selected to be prosecuted may appear "fair" in the sense that all 4500+ septic owners had equal opportunities to be "spared" from the first round of prosecutions, but in practice the process is **actually** unfair from the perspective that the Prosecution Team has stated that all 4500+ prosecutions will be "the same" and all brought between now and 2010 (end of the "cure period"). That means that the "cure period" given to the first CDO recipients will be longer than that given to the last ones and that the interim requirements imposed on the first round of CDO recipients will last for 3-4 years, while those same interim requirements will be imposed on the last wave of CDO recipients for a few weeks.<sup>1</sup>

Compounding this problem is the makeup of the Prosecution Team. In the case of *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4<sup>th</sup> 810, the appellate court held that it is violative of due process when the city attorney that routinely advises the city's personnel board also prosecutes before that board...the reason being is that such situation **creates an appearance of bias and unfairness**. The holding in *Quintero* was recently applied to the SWRCB and its attorneys in a Sacramento Superior Court case entitled *Morongo Band v. SWRCB*. In *Morongo*, the trial court held that a SWRCB attorney cannot act as an enforcement attorney before the SWRCB while concurrently acting as legal advisor for the SWRCB—even if the two matters are unrelated.

<sup>1</sup> There are other problems with the "random" selection, phased prosecution, and interim requirements aspects of these proceedings that go beyond due process and into the realm of civil rights violations and illegal assessments; however, such issues are beyond the scope of the Chair's requested briefing here and are only mentioned to ensure that they are not considered waived.

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1 MR. BRIGGS: As in now?

2 CHAIRPERSON YOUNG: In now, because some  
3 Board Members have expressed some concern about  
4 whether this penalty is enough. And so without  
5 getting into the details of that, I think there's  
6 a real issue as to dealing with the ongoing  
7 discharges.

8 So, whatever you can tell us about what  
9 staff's plans are, what the timeframe is, when the  
10 Board might see something, we would like to hear  
11 about it.

12 MR. BRIGGS: Okay. I've got to b a  
13 little bit careful because we're talking about  
14 enforcement action that's in progress, but I guess  
15 that's the first status report is that it is in  
16 progress.

17 And we have been working on -- we've  
18 already made some assignments in terms of putting  
19 together information on individual dischargers to  
20 take enforcement action against individuals.

21 And we've talked about, you know, some  
22 of the logistic problems of doing that. One of  
23 which, of course, is just the, one of the biggest  
24 bottlenecks is this process right here, the  
25 hearing.

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The rationale behind the holdings in both *Quintero* and *Morongo* is that

"For the Board to allow its legal advisor to also act as an advocate before it creates substantial risk that the Board's judgment in the case before it will be skewed in favor of the prosecution. The chance that the Board will show a preference toward [the deputy city attorney], even 'perhaps unconsciously' is present and unacceptable." *Quintero*, *supra*, at 817.

Thus, at a minimum in the case at bar, because Ms. Okun regularly advises this RWQCB and was a member of the Prosecution Team that prepared briefs submitted to this RWQCB and presented the Prosecution Team's case to this RWQCB, the appearance if not the actuality of unfairness is implied as a matter of law. Simply put, this RWQCB has now been unfairly influenced in these proceedings by having its counsel serve as prosecutor.

However, in order to be consistent with the legal mandates stated above, this RWQCB must go one step further than that taken by the courts in *Quintero* and *Morongo*; namely, to require that when and if new prosecutions are initiated that senior RWQCB staff (e.g. Mr. Briggs, Mr. Packard, and Mr. Thompson) be precluded from participating in the prosecution. The rationale for such conclusion is the same as that applied in *Quintero* and *Morongo*; namely that **ANYONE**, an attorney or otherwise, **who regularly advises the RWQCB** should not be allowed to prosecute before that same RWQCB. "It would only be natural for Board members, who have looked to [the deputy city attorney] for advice and guidance, to give more credence to his arguments when deciding plaintiff's case. Whether or not they actually did is irrelevant; the appearance of unfairness is sufficient to invalidate the hearing." *Quintero*, *supra*, at 816. See also *Howitt v. Superior Court of Imperial County* (1992) 3 Cal.App.4<sup>th</sup> 1575, 1585; *Civil Service Commission v. Superior Court* (1984) 163 Cal.App3d 70, 78, fn.1

Executive Officer Roger Briggs advises the RWQCB more often than any other person. Senior staff members Harvey Packard, and Matt Thompson advise the RWQCB often. Presumably, the RWQCB members trust these three senior staff members, otherwise they would not be senior staff. Thus, according to *Quintero*, it would be natural for this RWQCB, which has looked to senior staff for advice and guidance, to give more credence to their arguments when deciding the CDO matters. Whether or not the RWQCB members actually do or not is irrelevant; the appearance of unfairness is sufficient to invalidate the hearing. Coupled with the fact that three of the top six advisors to the RWQCB (four if one counts Ms. Okun) are on the Prosecution Team in this instance, the appearance of manifest unfairness is not just present—it is grossly apparent.

PUBLIC HEARING

BEFORE THE

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

CENTRAL COAST REGIONAL WATER QUALITY CONTROL BOARD

In the Matter of: )  
 )  
Administrative Civil Liability )  
Complaint No. R3-2005-0137 )  
 )  
Re: Los Osos Community Services )  
District, Los Osos Wastewater )  
Project )  
San Luis Obispo County )  
 )

CENTRAL COAST WATER BOARD

CONFERENCE ROOM, SUITE 101

895 AEROVISTA PLACE

SAN LUIS OBISPO, CALIFORNIA 93401

CLOSING ARGUMENTS - DECISION

THURSDAY, JANUARY 5, 2006

10:03 A.M.

Reported by:  
Peter Petty

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345



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Michael Thomas  
June 22, 2006  
Page 8

must recuse themselves from this and future enforcement actions against the Lc s Osos septic system owners.

To honor the right to due process, a decision-maker **MUST**—not “may” or “should”— be disqualified when his role as a non-partisan player has been compromised. *Nightlife Partners, supra*, at 98. Here, RWQCB members who initiated prosecution and have been, as a matter of law, unduly influenced by the Prosecution Team are, without question, compromised as neutral decision-makers.

From a statutory perspective, there are no laws directly addressing the disqualification of biased administrative decision-makers; however, there are rules governing disqualification of judges that are applicable here by analogy because RWQCB enforcement proceedings are quasi-adjudicative in nature and, therefore, the RWQCB's are obligated to assure the same constitutionally-based due process protections as the courts.

28 U.S.C. Section 455 requires that “any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” California Code of Civil Procedure Section 170 states that no judge shall preside in a case in which he is not wholly free, disinterested, impartial, and independent. If a reasonable person, aware of all the facts, would fairly entertain doubt concerning a judge's impartiality, disqualification is mandated, and the existence of actual bias is not required. CCP Section 170.1(a)(6)(C) In this case, given the statements of the RWQCB members quoted above coupled with the undue influence of the Prosecution Team, it is certainly reasonable to question whether these four RWQCB members are giving each of the 45 CDO respondents fair and unbiased consideration. Nor can it be said that the four RWQCB members are independent arbiters because they, themselves, initiated the prosecutions. Combined, these circumstances certainly create enough doubt as to impartiality and, as such, disqualification is mandated.

In *Schmidt v. United States* 115 F.2d 394, 398 (1940) the court concluded that the trial court judge should have recused himself when an affidavit alleged that the judge was informed in advance of the facts by the prosecutor and expressed a prejudicial opinion regarding the facts of the case an alleged guilt of the defendant. Under these circumstances, the court reasoned that “even a judge may not put aside the propensities of human nature as easily as he does his robe.” In order to eliminate the possibility of any unfairness, the court remanded the case for further proceeding: before another judge. Here, the prejudicial comments by RWQCB members at the conclusion of the ACL action in January, 2006 clearly were slanted toward liability of the individual

**Onstot, Stephen R.**

**From:** Daniel Bleskey [dbleskey@lososocsd.org]  
**Sent:** Thursday, April 27, 2006 2:18 PM  
**To:** Biggs, Julie Hayward; Onstot, Stephen R.; Chuck Casanna, Director; John Foulke; Julie Tucker; Lisa Schicker; Steve Senet Director  
**Subject:** FW: Re: LOCSD President Lisa Schicker writing Chairwoman Tam Doduc re April 28 RWQCB3 CDO Hearings - CEQA air

FYI

\*\*\*\*\*

> Date: Thu, 27 Apr 2006 13:49:15 -0700  
 > From: "Tam M. Doduc" <TDoduc@waterboards.ca.gov>  
 > To: <lisaschicker@charter.net>  
 > Cc: "Celeste Cantu" <CCantu@waterboards.ca.gov>,  
 "Michael Lauffer" <MLauffer@waterboards.ca.gov>,  
 "Roger Briggs" <Rbriggs@waterboards.ca.gov>  
 > Subject: Re: LOCSD President Lisa Schicker writing Chairwoman Tam  
 Doduc  
 re April 28 RWQCB3 CDO Hearings - CEQA air

>  
 > Dear Ms. Schicker --

>  
 > Thank you for your e-mail. The State Water Resources Control Board takes due process concerns very seriously. While I cannot actively intervene in the on-going process before the Central Coast Water Board, I have relayed your concerns to the Regional Water Board staff. I have also requested that they carefully consider all procedural requests (such as your request for a continuance) and ensure that their hearing procedures protect the due process rights of all individuals.

>  
 > Regards,  
 > Tam M. Doduc  
 > State Water Resources Control Board  
 > (916) 341-5611

>  
 > >>> <lisaschicker@charter.net> 04/27/06 1:00 PM >>>  
 > Dear Ms. Doduc:

>  
 > I am requesting the State Board's immediate intervention on the public hearing that is to take place in Region 3 tomorrow - San Luis Obispo - for the fifth time now, our local RWQCB has altered and changed the CDO hearing information that has been released to the CDO recipients and the public - they have altered the information AGAIN just today - neither my constituents, not the press nor the general public or media, nor the other agencies involved, can keep up with this constant alteration of the terms and conditions and requirements of this hearing, a fair and equitable hearing is impossible.

>  
 > I will represent the LOCSD and the citizens of Los Osos at this hearing, but this continual revision of information has violated due process for all. How can anyone keep up - my board are working professionals, and individual citizens cannot be expected to follow every twist and turn that develops day by day.

>  
 > We respectfully request a continuance on this matter, and that the State Board intervene immediately to suspend the CDO hearings that are to be placed on the random selection of 45 citizens in Los Osos.

>  
 > The county and the regional water board agreed to terms for a prohibition zone back in 1983 - the basis for the prohibition was a build out population of 27,000 that does not exist today (we have only 15,000, capped at 19,000), it was also based on flawed nitrate data from wells that leaked (bad seals, leaking wells) and both the county and the board allowed 1150 more homes to be built after the prohibition was in place.

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septic system owners; accordingly, evidence of bias exists and due process is violated absent recusal of the RWQCB members.

Accordingly, because the adjudicators of the CDO actions either *appear to be* or *actually are* biased, they must recuse themselves from hearing enforcement actions relating to Los Osos septic systems.

### CONCLUSION

For all of the foregoing reasons, the instant CDO actions should be dismissed, senior staff should be barred from prosecuting future enforcement actions before this RWQCB, and the RWQCB members who have participated thus far in the instant proceedings should permanently recuse themselves from current and future adjudication of enforcement actions involving septic systems in Los Osos.

Very truly yours,

BURKE, WILLIAMS & SORENSON, LLP



STEPHEN R. ONSTOT

SRO:jdp  
Enclosures